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No. 07-816

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113,
WASHINGTON, D.C. 20515,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The decision below centers on the Speech or Debate Clause of the Constitution: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." U.S. Const., art. I, § 6, cl. 1. This Clause – which applies to all activities within the "legislative sphere" and, among other things, privileges Members absolutely from having to disclose legislative materials – is a fundamental pillar of Congress's independence and is critically important to its relationship with the other branches of government. This case arises out of the Department of Justice's ("Justice Department" or "Department") historically unprecedented search and seizure of paper and electronic records – including a substantial quantity of legislative records – from the Capitol Hill office of Louisiana Congressman William J. Jefferson in May 2006. The Congressman had no opportunity to review and set aside – prior to the search and subject to later judicial review – records that were arguably or unquestionably legislative.

Amici curiae Scott B. Palmer, Theodore Van Der Meid, Elliot S. Berke, William H. Cable, Philip George Kiko, and Reid Stuntz are former senior congressional staffers who, combined, have more than 100 years of experience in the legislative branch. Given their former capacities as high-ranking congressional staffers – and in two cases also as high-ranking officials in the

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

executive branch – *amici* have a very profound understanding of the importance of the Speech or Debate Clause and its fundamental place in the Constitution's separation of powers.

Mr. Palmer served as Chief of Staff to the then-Speaker of the U.S. House of Representatives ("House"), J. Dennis Hastert, from 1999-2007. He also served as Congressman Hastert's Chief of Staff from 1987-99. During that time, from 1995-99, Mr. Palmer was also Deputy Chief of Staff to the House Majority Whip.

Mr. Van Der Meid also served on the staff of former Speaker Hastert, as Counsel and Director of Floor Operations from 1999-2007. Prior to that, he was Staff Director and Chief Counsel to the House Committee on Standards of Official Conduct from 1995-99. Mr. Van Der Meid also served for nearly six years as General Counsel to then-Republican Leader Robert Michel.

Mr. Berke served as Counsel to then-Speaker Hastert for most of 2006. For two years prior to that, he served as General Counsel to the House Majority Leader. From 1998-99 and 1997-98, respectively, he was Counsel to the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, and Investigative Counsel to the House Committee on Government Reform and Oversight.

Mr. Cable served as Chief of Staff to House Majority Leader and former House Minority Whip Steny H. Hoyer from 2006-07 and 2005-06, respectively. He also served as Administrative Counsel for the House Chief Administrative Officer from 2004-05 and Democratic Staff Director for the Committee on House Administration from 2002-03. Mr. Cable also served

as Staff Director and Counsel to the Committee on House Administration from 1976-77 and Counsel for the House Committee on Education and Labor from 1967-76. From 1977-81 he served as Deputy Assistant to the President of the United States.

Mr. Kiko's most recent House appointment was from January through April 2, 2007, when he served as counsel to Congressman F. James Sensenbrenner, Jr. From 2001-07, he served as Chief of Staff and General Counsel to the House Judiciary Committee. Prior to that, from 1999-2001, he served as Chief of Staff and Counsel to Congressman Sensenbrenner. From 1997-99, he served as Deputy Chief of Staff and Counsel to the House Committee on Science, and from 1995-97, he served as Associate Administrator for Procurement and Purchasing in the Office of the Chief Administrative Officer of the House. From 1987-95, he served in various capacities at the Department of the Interior: Legislative Counsel, Director of Budget and Program Resource Management, and Deputy Director in the Office of Hearings and Appeals. Mr. Kiko also served from 1986-87 as Acting Director of the Policy Enforcement Service Office for Civil Rights in the Department of Education. From 1983-86, he served as Minority Associate Counsel to the House Judiciary Committee. And, from 1979-83, he served as Executive Assistant and Legislative Director to Congressman Sensenbrenner.

Mr. Stuntz served for 18 years with the House Committee on Energy and Commerce (known from 1995-2002 as the Committee on Commerce). During that time, he was Counsel and then Staff Director/Chief Counsel to the Subcommittee on Oversight and Investigations (1988-91; 1991-95), and from 1995-97 and 1997-2006, he was Minority General Counsel

and then Minority Staff Director/Chief Counsel, respectively, for the full Committee.

Amici – four of whom also appeared as *amici* in the court of appeals – do *not* file this brief to protect Congressman Jefferson; to suggest that he or any other Member of Congress is above the law or immune from prosecution; or to suggest that no search warrant can ever be executed on a congressional office. They do, however, have a very great interest in ensuring that, in reconciling the Speech or Debate Clause with the Department's legitimate interests in investigating and prosecuting legislators who may have engaged in criminal activities, the Clause is construed and applied in a manner that preserves the independence of the legislative branch essential to our system of checks and balances.

SUMMARY OF ARGUMENT

Amici oppose the Justice Department's petition because Supreme Court review of the question presented is premature, inappropriate, and unwarranted. The question presented is what procedures the executive branch should follow in any possible *future* searches of congressional offices in light of the Speech or Debate Clause of the Constitution. Review is *premature* because, as prescribed by the court of appeals, the House and the Department are currently negotiating in good faith over procedures and protocols that will reconcile the Speech or Debate Clause with the Department's legitimate law enforcement interests. Both the Attorney General and the Speaker of the House have made clear publicly that such an approach is preferable to judicial intervention, and thus it is clear that this Court's review in this case would

frustrate efforts that are best left to the political branches in the first instance.

Review is *inappropriate* because the petition seeks an advisory opinion, which is particularly improvident where a constitutional question involving the separation of powers between the two political branches is presented. While the Justice Department's petition ostensibly concerns its efforts to obtain access to documents seized from Congressman Jefferson's office – as to which the Congressman has asserted privilege – the petition makes clear that the Department seeks to use this opportunity to obtain an advisory opinion on a host of issues unrelated to the assertedly privileged documents. Nearly the entire petition seeks resolution of issues regarding myriad other forms and locations of searches – wiretapping and pen registers, searches in vehicles, homes, and out-of-town offices – that have no bearing whatsoever on this case. Any opinion addressing those issues would be advisory and therefore impermissible.

Review is *unwarranted* not only because the court of appeals' decision was correctly decided but also because there is no conflict between it and any Supreme Court precedent or with another circuit court opinion. Indeed, there could not be any conflict because there has never before in our country's 225-year history been a search of a congressional office by the executive branch. Recognizing this fact, the petition attempts to recast the issue presented at an extraordinarily high level of generality; namely whether the Speech or Debate Clause applies to the discovery of documents. But even under the Department's expansive view of the question presented, it identifies only *one* decision from *one* other circuit, the Third Circuit, allegedly in conflict with the decision below. More-

over, the Third Circuit not only has retreated from its circumscribed view of the Clause, it also has not applied that particular view in over 20 years. In any event, even assuming, *arguendo*, that a live conflict exists, the court of appeals correctly decided this case. Its decision was squarely in line both with its own and this Court's precedents. Those prior decisions have made clear that the Speech or Debate Clause is to be interpreted broadly and with regard to its fundamental purpose in the constitutional scheme. Those prescriptions can lead only to the conclusion that the privilege encompasses legislative records.

BACKGROUND AND INTRODUCTION

In May 2006, the Federal Bureau of Investigation ("FBI") executed a search warrant on Congressman Jefferson's office in the Rayburn House Office Building. The FBI seized two boxes of paper records and imaged or copied all of the office's computer hard drives, as well as two USB memory sticks. This was the first such warrant to be executed on a congressional office since the Constitution's adoption. *See* App. 11a.

Congressman Jefferson moved in the U.S. District Court for the District of Columbia for the return of his records, principally on the ground that the search violated his rights under the Speech or Debate Clause. This challenge was rejected by the district court, however, because, *inter alia*, the Congressman "was not made to say or do anything," and thus "the Speech or Debate Clause's testimonial privilege was not triggered by the execution of the search warrant." App. 55a-56a.

The Congressman appealed and then moved for a stay pending appeal. The D.C. Circuit granted that

motion and enjoined the Department from resuming its review of the materials seized. *United States v. Rayburn House Office Bldg., Room 2113*, No 06-3105, Order at 1 (D.C. Cir. July 28, 2006) (hereinafter "Remand Order"). The Remand Order outlined the procedures by which the district court should determine what information, if any, was privileged. Specifically, the district court was instructed to copy all of the documents – physical and electronic[2] – seized by the Justice Department and to give the Congressman an opportunity to submit a list, *ex parte*, of any documents over which he claims privilege. *Id.* The district court was then tasked with assessing, *in camera*, whether or not those claims were valid. *Id.* The district court is in the midst of this review. Pet. at 22.

None of these proceedings, however, hampered the Department in its investigation of Congressman Jefferson. On June 4, 2007, less than three weeks after oral argument was heard in the D.C. Circuit, the grand jury returned a 16-count indictment against the Congressman in the Eastern District of Virginia. App. 8a. As the petition notes, the Congressman's trial is scheduled to commence later this month[3] as "the government does not intend to seek a delay in the hope of securing additional evidence after the district court has completed its review." Pet. at 10-11.

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[2] The district court was instructed to apply a series of search terms selected from the warrant to the electronic files in order to generate a list of responsive records that could be forwarded and reviewed by Congressman Jefferson.

[3] Due to the possibility of interlocutory appeals on motions submitted by the defense, the trial may be postponed until after February 25, 2008, the current trial date.

Two months after the grand jury's indictment, the D.C. Circuit reversed the district court's decision. The court of appeals held that "[t]he Executive's search of the Congressman's paper files . . . violated the [Speech or Debate] Clause," although "its copying of computer hard drives and other electronic media is constitutionally permissible because the Remand Order affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive." App. 18a.

The court of appeals acknowledged that *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), which held that the Speech or Debate Clause "includes a non-disclosure privilege," is controlling. App. 11a. The court reaffirmed that "a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put." *Id.* at 12a. The court further explained that Congressman Jefferson did not suggest "that he was entitled to prior notice of the search warrant before its execution," or "that his assertions of privilege could not be judicially reviewed." *Id.* at 15a-16a. Rather, the Congressman merely asserted "that the warrant procedures *in this case* were flawed because they afforded him no opportunity to assert the privilege before the Executive scoured his records." *Id.* at 16a (emphasis added).

The court of appeals concluded that there was "no reason why the Congressman's privilege . . . cannot be asserted at the outset of a search [of his office] in a manner that also protects the interests of the Executive in law enforcement." *Id.* at 17a. It noted that its Remand Order "illustrates a streamlined approach by

narrowing the number of materials the district court may be required to review." *Id.* The court added, however, that any accommodation regarding how the executive branch will conduct future searches of Member's offices, if any, "is best determined by the legislative and executive branches in the first instance." *Id.* at 18a. This process is now underway.

ARGUMENT

I. Review Would Be Premature As The Political Branches Are In The Process Of Addressing The Very Issue Raised By The Petition.

The Court should deny the Justice Department's petition because it seeks resolution of an issue – the procedures by which the executive branch may execute a search warrant for the office of a sitting Member of Congress – that is the subject of active, ongoing, and good faith negotiations between the political branches. Prudence counsels that the Court avoid entreaties for resolution of this complex issue before the coordinate branches have had a full opportunity to reach a mutually acceptable accommodation.

The Attorney General shares this view. In recent testimony before the House Judiciary Committee concerning searches of congressional offices, the Attorney General had the following exchange on the subject with Committee Member Howard Berman:

> **Mr. Berman.** [Does] your desire for cooperation between the Justice Department and the Congress . . . apply to jointly developing mutually agreeable procedures to govern any future search warrants executed on congressional offices in such a way as to protect legitimate law enforcement needs, while also respecting the

speech or debate clause of the Constitution and the separation of powers?

Attorney General Mukasey. I think I can say it emphatically includes that. Because I believe there are ongoing discussions to resolve precisely that. There is a case that was brought, as you know. We petitioned for cert, I believe. We would much prefer to resolve that case in the way that most disputes with respect to privilege and other matters are resolved between Congress and the Justice Department, namely by conversation and accommodation. And, as I understand it, that's actively underway.

Mr. Berman. . . . . [A]re you saying that the Justice Department is actively engaged and committed to working to develop such a mutually agreeable process?

Attorney General Mukasey. Both of those. And I deeply hope that it comes out that way, rather than in some bright-line ruling that one of us can't live with or would find it awkward to live with.

Mr. Berman. Great. And then, finally, if there is such an agreement, would you support setting forth that agreement in a memorandum of understanding or legislation or in some other fashion?

Attorney General Mukasey. I think precisely how that – what the terms of the agreement are will govern, to a certain extent, how it's to be set forth. I'm, at this point, more concerned that we reach agreement. Once we reach agreement, I think we can figure out precisely

> how to set it forth, whether it has to be in a memorandum of understanding or in some other fashion. But I certainly favor the success of the conversations that I understand to be now ongoing.

Hearing on Oversight of the Dep't of Justice Before the H. Comm. on the Judiciary, 110th Cong. 27-29 (Feb. 7, 2008) (transcript) (forthcoming), Add. A at 1a-3a.

The House leadership also subscribes to this view. A few days after the search warrant was executed on Congressman Jefferson's office, then-Speaker J. Dennis Hastert and then-Democratic Leader and now-Speaker Nancy Pelosi directed the House Office of General Counsel to "begin negotiations with the Department of Justice regarding the protocols and procedures to be followed in connection with evidence of criminal conduct that might exist in the offices of Members." Joint Statement of Speaker Hastert and Leader Pelosi (May 25, 2006), Add. B at 4a; *see also* Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives, to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington at 3-4 (Feb. 13, 2008), *available at* http://www.citizensforethics.org/files/021308%20-%20Response%20from%20House%20Counsel.pdf.

Thus, with both the head of the Justice Department and the Speaker of the House fully committed to these discussions, it would be premature for the Court to weigh in on this acute political question at this time. The court of appeals itself recognized the importance of judicial self-restraint during this process. *See* App.18a (noting that the procedures by which agents of the executive branch are permitted to

search a Member's congressional office are "best determined by the legislative and executive branches in the first instance").

II. The Department Seeks An Advisory Opinion From The Court And The Instant Case Does Not Present Issues That Are Sufficiently Developed For Consideration By The Court.

"It has long been [the Court's] considered practice not to decide abstract, hypothetical or contingent questions . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . ." *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945). Indeed, "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 65-66 (6th ed. 2002). This is so because "'[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy.'" *U.S. Nat'l. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); *see also Flast v. Cohen*, 392 U.S. 83, 97 (1968). The Supreme Court is thus not empowered to decide abstract propositions, or to declare, for application in *future* cases, principles or rules of law which are not aimed at resolving the matter at hand. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). "Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Preiser*, 422 U.S. at 401 (quoting *Rice*, 404 U.S. at 246). Suits must be "pressed before the Court with

that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). Moreover, "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

The rule against advisory opinions has particular force when disputes involve questions of constitutional dimensions. *See Alabama v. Shelton*, 535 U.S. 654, 676 (2002) (Scalia, J., dissenting) (noting the Court's "longstanding refusal to issue advisory opinions, particularly with respect to constitutional questions" (citation omitted)); *see also Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them."); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Moreover, "[w]hen the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned to them by Article III." *Flast*, 392 U.S. at 96.

The petition unquestionably seeks an advisory opinion, and its focus is not on obtaining the documents at issue, but rather on numerous other *hypothetical* questions. It ignores the limited nature of the holding below, which was specific to the issue of the

search of a Member's office and did not address the tangential issues of electronic searches or searches in places other than a Member's office. Moreover, the petition does not offer any argument as to why the documents at issue – those seized from the Congressman's office on Capitol Hill which the Congressman contends are privileged – are relevant to the pending Jefferson trial or any current investigation of Congressman Jefferson.

The bulk of the petition focuses on three hypothetical scenarios that the Department asserts are implicated by the D.C. Circuit's decision: (1) the lower court's decision "impede[s] searches of Members' homes, vehicles, or briefcases," Pet. at 12; (2) the decision below has deleterious consequences for future use of "wiretaps and pen registers directed at Members," *id.*; and (3) evidence obtained from Members of Congress in the future may be altered or destroyed as a result of the procedures recommended by the court of appeals in response to a claim of privilege under the Speech or Debate Clause, *id.* at 20. None of these wholly hypothetical scenarios, however, is at issue.

It is uncontested that the seizure in this case did not involve documents in a Member's home, vehicle, or briefcase. Nor did it involve documents in Congressman Jefferson's district office in Louisiana. It is thus of no moment that "in the District of Columbia, for example, the Department will no longer search for documents in an office of a Member located *in his home* because of concerns that a search could (under the court of appeals' decision) taint an investigation." *Id.* at 24 (emphasis added).

This case also does not concern "wiretaps and pen registers directed at Members." *Id.* at 24. Again, the fact that, as a result of the decision below, the Department is now allegedly limiting its "inten[tions] to use wiretaps against Members in the District of Columbia," *id.* at 25, has no bearing on *this case*. The documents at issue were not obtained with wiretaps or pen registers, nor was either method addressed by the court of appeals.

The Department asserts, in some detail, that, when executing a search warrant, it must have total control of the situation and that it cannot, under any circumstances, abdicate any part of that function. *Id.* at 19-23. Such control, however, is also not at issue in this case. The Department long ago seized all of the information in question – *i.e.*, it clearly exercised "'unquestioned command of the situation.'" *Id.* at 20 (citation omitted). There is no live concern that "[i]f a Member or his aides were to screen documents in the first instance, the evidentiary value of the search would be jeopardized," or that "[t]he Member might add fingerprints to evidence" or "rearrange documents." *Id.* Thus, insofar as the Department is concerned with the execution of *this* search warrant, there is no "'real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Rice*, 404 U.S. at 246 (citation omitted).

Further, it is telling that the petition initially indicates – but does not follow through on – its endeavor to "explain[how] the evidence seized in Representative Jefferson's office remains relevant to the government's ongoing investigation of others who may have been involved in criminal activity with Representative

Jefferson." Pet. at 11. This failure merely confirms – along with the fact that the Department is moving full steam ahead with its prosecution of Congressman Jefferson – that its petition addresses issues other than those presented by this case.

In perhaps its lone attempt to tether its petition to the actual facts of this case, the Department argues that despite the lower court's statement that "the Congressman's privilege under the Speech or Debate clause" could be "asserted at the outset of a search in a manner that also protects the interests of the Executive in law enforcement," App. 17a, "the court offered no explanation of *how* that assertion could be made, either constitutionally or practically," Pet. at 19. This characterization, however, is not only incorrect, but any purported need for clarification only serves to demonstrate further why granting the petition would merely yield an advisory opinion.

First, the court below very clearly outlined the procedures necessary to effectuate its ruling. As the petition itself acknowledges, Congressman Jefferson has already fully complied with the court of appeals' mandate to "submit to the District Court . . . any claims that specific documents or records are legislative in nature," App. 76a, and the district court's *in camera* review is underway. *See* Pet. at 22.

Second, the reason the court of appeals did not set out procedures beyond its Remand Order – and precisely the reason why a decision by this Court would be an advisory opinion – is that any further ruling was not necessary to the disposition *of this case*. Because the Department had *already searched and seized* the materials in question, the role of the court of appeals was to determine *only* what retroactive

procedures were most appropriate to remedy the Department's constitutional violation – not to set out procedures to govern potential searches in the future. As the court of appeals noted, that is exactly what the political branches should work out "in the first instance." *See* App. 18a.

At bottom, each of the above concerns expressed by the petition is a function of the Department's view that "the decision may *presage* a more expansive application" than mere "'compelled disclosure.'" Pet. at 25 (emphasis added). Such an application, however, has not yet occurred. And while we recognize that denial of the petition "would not serve the interest of providing additional guidance to the law enforcement community," "regarding that interest as paramount would support the wholesale adoption of a practice of rendering advisory opinions at the request of the Executive – a practice the Court abjured at the beginning of our history." *United States v. Sharpe*, 470 U.S. 675, 726 (1985) (Stevens, J., dissenting). The Court has instead wisely "opted for a policy of judicial restraint – of studiously avoiding the unnecessary adjudication of constitutional questions." *Id.* at 727.

III. There Is No Live Conflict Among The Circuits And The Court Of Appeals Correctly Determined That The Speech Or Debate Clause Bars The Discovery Of Legislative Records.

Two additional factors demonstrate why review here is inappropriate. *First*, despite the Department's suggestion to the contrary, *see* Pet. at 26, there simply is no live conflict among the circuits that warrants review. The Department *does not cite to a single case* beyond this one that involves the execution of a search warrant on the office of a sitting Member of

Congress. No court of appeals has addressed this issue prior to the decision of the court below.

Without a single like case on which to rely, the Department thus attempts to drum up a conflict by looking at a much broader principle of law: whether the Speech or Debate Clause bars discovery of legislative records. Even in this regard, the Department cites only one 30-year old case in the Third Circuit that is allegedly in conflict with the D.C. Circuit. *See id.* (citing *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) ("*Eilberg*")). *Eilberg*, however, lends little or no support to the Department's suggestion that a conflict exists. It involves a unique and easily distinguishable set of facts,[4] has been viewed equivocally by later decisions in the Third Circuit,[5] and has not been employed in that circuit in over 20 years.

Second, the decision below was clearly correct. It is in line with well-established precedents of this Court that the Speech or Debate Clause broadly "prohibits inquiry into . . . legislative acts." *Gravel v. United States*, 408 U.S. 606, 616 (1972); *see also Doe*

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[4] *Eilberg* concerned an appeal from a denial of a motion to quash a grand jury subpoena, issued to the Clerk of the House, which sought telephone records of then-Congressman Joshua Eilberg. The Third Circuit found the testimonial (*i.e.*, nondisclosure) aspect of the privilege not implicated only because neither the Congressman nor his aides had been subpoenaed, and because the telephone company possessed duplicates of the phone records sought. *Eilberg*, 587 F.2d at 597.

[5] The Third Circuit has pulled back from its original statement in *Eilberg*, more recently noting that "[o]ur precedents have *suggested* that the privilege is *primarily* one of non-evidentiary use, not one of non-disclosure." *In re Grand Jury*, 821 F.2d 946, 953 n.4 (3d Cir. 1987) (emphasis added).

v. McMillan, 412 U.S. 306, 312 (1973). The Department, on the other hand, asks the Court to confine the application of the privilege in an extraordinarily narrow fashion. According to the Department, the Clause should only apply when a Member is "question[ed]" or asked to testify about a non-confidential or "public" action. Pet. at 15-16. This exceedingly literalistic construction of the Clause is inconsistent with this Court's precedents and the policy underlying the Clause.

The Court has long made clear that the Speech or Debate Clause is to be construed broadly, not narrowly. For example, in *Gravel*, the Court extended the protections afforded under the Clause beyond the Members of Congress themselves to their aides. *Gravel*, 408 U.S. at 616. In doing so, the Court acknowledged that "[i]t is true that the Clause itself mentions only 'Senators and Representatives,'" but it asserted that "prior cases have plainly not taken a literalistic approach in applying the privilege." *Id.*; *see also id.* ("The Clause also speaks only of 'Speech or Debate,' but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view."). Likewise, in *United States v. Johnson*, 383 U.S. 169 (1966), the Court explained that "the privilege should be read broadly, to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *Id.* at 179 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

With this in mind, it is plain that legislative documents fall within the Clause's ambit. It is self-evident that the work of today's Congress is document

intensive. Legislative work is no longer relegated to floor speeches as it may have been in seventeenth century England, and the lower courts have properly construed the Clause to take account of that fact. *See United States v. Brewster*, 408 U.S. 501, 525 (1972) (asserting generally that "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process"). As Judge Silberman explained in *Brown & Williamson,* "[d]ocumentary evidence can certainly be as revealing as oral communications," and that "indications as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do – and this is true whether or not the documents are sought for the purpose of inquiring into (or frustrating) legislative conduct or to advance some other goals." 62 F.3d at 420. And, moreover, if "the touchstone [of the Clause] is interference with legislative activities," it follows that "the nature of the use to which documents will be put – testimonial or evidentiary – is immaterial." *Id.* at 421.

It is thus plain that legislative documents are protected by the Speech or Debate Clause. This Court has explained that "[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation *without intimidation or threats from the Executive Branch.*" *Gravel*, 408 U.S. at 616 (emphasis added). As discussed above, in order to meet this aim, all legislative acts, not just those conducted in public and about which a Member is orally questioned, must be protected. This is exactly what the court of appeals recognized and is also why certiorari is unwarranted.

CONCLUSION

For the reasons set forth herein, *amici* respectfully urge the Court to deny the petition for certiorari.

Respectfully submitted,

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February 19, 2008

ADDENDUM

Addendum A

Hearing on Oversight of the Department of Justice
Thursday, February 7, 2008
House of Representatives,
Committee on the Judiciary
Washington, D.C.

Mr. Berman. I would like to go to another subject.

You have stated, I believe several times, both in your confirmation process and since, of your desire for cooperation between the Justice Department and the Congress.

Mr. Berman. My question is, does that cooperation apply to jointly developing mutually agreeable procedures to govern any future search warrants executed on congressional offices in such a way as to protect legitimate law enforcement needs, while also respecting the speech or debate clause of the Constitution and the separation of powers?

Attorney General Mukasey. I think I can say it emphatically includes that. Because I believe there are ongoing discussions to resolve precisely that. There is a case that was brought, as you know. We petitioned for cert, I believe. We would much prefer to resolve that case in the way that most disputes with respect to privilege and other matters are resolved between Congress and the Justice Department, namely by conversation and accommodation.

And, as I understand it, that is actively underway.

Mr. Berman. You are right, I believe and that this is part of a recent meeting between the House Office of General Counsel and the Justice Department.

I guess, are you saying that the Justice Department is actively engaged and committed to working to develop such a mutually agreeable process?

Attorney General Mukasey. Both of those.

And I deeply hope that it comes out that way, rather than in some bright-line ruling that one of us can't live with or would find it awkward to live with.

Mr. Berman. Great.

And then, finally, if there is such an agreement, would you support setting forth that agreement in a memorandum of understanding or legislation or in some other fashion?

Attorney General Mukasey. I think precisely how that what the terms of the agreement are will govern, to a certain extent, how it will be set forth.

I am, at this point, more concerned that we reach agreement. Once we reach agreement, I think we can figure out precisely how to set it forth, whether it has to be in a memorandum of understanding or in some other fashion.

But, I certainly favor the success of the conversations that I understand to be now ongoing.

Mr. Berman. Well, thank you. I think you have covered that subject. And I appreciate your responses.

. . .

Addendum B

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FOR IMMEDIATE RELEASE:
May 25, 2006

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Joint Statement from Speaker Hastert and Leader Pelosi

(Washington, D.C.) Speaker of the House J. Dennis Hastert (R-IL) and Democratic Leader Nancy Pelosi (D-CA) today issued the following statement:

"Today, we are directing the House Counsel to begin negotiations with the Department of Justice regarding the protocols and procedures to be followed in connection with evidence of criminal conduct that might exist in the offices of Members."

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